Supreme Court, U.S.
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No. 97-108

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT HAGOOD, III,

Petitioner,

v.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT; AND PERSONNEL BOARD OF THE STATE OF ALABAMA,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

1. Whether due process in the employment termination before the court is satisfied when the hearing officer's findings were rejected by the State Personnel Board, based upon a finding that evidence existed in the record to support the termination.

PARTIES, PARENT COMPANIES AND SUBSIDIARIES

In compliance with Supreme Court Rule 14(b) Petitioner represents that the parties to this petition are all named in the caption of this case. To the knowledge of the Petitioner, there are no parent companies or non-wholly owned subsidiaries with an interest in the case.

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REFERENCE TO REPORTS OF OPINIONS

The unpublished decision of the Alabama Supreme Court, denying the petition for Writ of Certiorari, was entered on April 18, 1997. (Petitioner's Brief, Appl. 1a). The Court Entered the final decision of the Alabama Court of Civil Appeals, presently unpublished, on January 10,

1997. (Petitioner's Petition For A Writ Of Certiorari, App. 2a). In said decision, the Alabama Court of Civil Appeals withdrew its original decision, and as such, the July 12, 1996 opinion is not included in the appendix herein. The unpublished decision of the Circuit Court of Montgomery County, Alabama was entered on December 21, 1995. (Petitioner's Petition For A Writ Of Certiorari, App. 6a). The unpublished administrative order of the applicable state agency, affirming the dismissal of Robert Hagood, was entered on October 11, 1994. (Petitioner's Petition For A Writ Of Certiorari, App. 16a). And finally, the Recommended Order of the Hearing officer, recommending reinstatement, was entered on April 9, 1994. (Petitioner's Petition For A Writ Of Certiorari, App. 18a).

CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the Supreme Court of the State of Alabama being reviewed is dated April 18, 1997. (Petitioner's Petition For A Writ Of Certiorari, App. 1a.) The statutory provision conferring jurisdiction upon this Court to review the judgment or decree in question by Writ of Certiorari is 28 U.S.C. § 1257(a). In addition, Rule 10 of the Supreme Court Rules provides for review by this Court of decisions by a state court of issues of federal law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Petitioner's Petition For A Writ Of Certiorari, pp. 2-12.

STATEMENT OF THE CASE[1]

A. Course Of The Proceedings And Dispositions In The Court Below

The Petitioner, Robert Hagood, was dismissed from his position as a pollution control specialist with the Defendant, the Alabama Department of Environmental Management ("ADEM") on October 15, 1993. ADEM cited, in the dismissal letter sent to the Petitioner, poor work performances and a failure to meet the standards established for his job classification for the two years preceding his termination. (C. 93-94). Mr. Hagood appealed his dismissal to the State Personnel Board ("Board") under the authority of *Ala. Code* §36-26-27, (1975). The Board appointed a Hearing Officer to conduct an evidentiary hearing to report his findings of fact, conclusions of law, and a recommended action.

The Hearing Officer conducted a hearing on March 18, 1994. The Hearing Officer concluded "there was a lack of evidence to show that Robert B. Hagood was deficient in his job performance to any significant degree," and recommended to the Board "that Robert B. Hagood's dismissal be overturned and that he be re-employed ... with back pay." (C. 5-12).

ADEM filed written exceptions to the Hearing Officer's Report. (C. 58-87). The Plaintiff filed a Rebuttal to the written exceptions. (C. 46-56). The Board heard oral argument from the parties on August 16, 1994. The

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[1] The letter "C" rather than "R" precedes all citations to the record contained in this brief, because there is no separate reporter's transcript in this case. The clerk of court, below, has instead inserted the administrative record in sequential number with the clerk's record.

Board reviewed and considered the record in this proceeding over the next two monthly meetings, and entered an order on October 11, 1994, rejecting the Hearing Officer's conclusions and recommendation, and upholding Mr. Hagood's dismissal. (C. 13-14). During the October 11, 1994 meeting, the Plaintiff filed a Motion to Recuse Board Member Harrell from considering the appeal. (C. 43-45). The Board by preliminary Order, denied the Motion to Recuse as untimely and without merit. (C. 15). The Board's Order upholding the dismissal concluded, as a matter of law, that there was sufficient evidence to support the dismissal charge and that the termination was warranted. (C. 13-14). Mr. Hagood then appealed to the Montgomery Circuit Court pursuant to *Ala. Code* § 41-22-20, (1975).

On December 6, 1995, the parties presented oral argument before Circuit Judge Randall Thomas. On December 21, 1995, Judge Thomas issued an Order reversing the decision of the Board and ordering Mr. Hagood reinstated with back pay.

On January 3, 1996 ADEM pursuant to *Ala. Code* § 41-22-21, (1975) filed an appeal from the Circuit Court's ruling with the Alabama Court of Civil Appeals. (C. 763-764).

B. Stage And Manner In Which Federal Questions Were Raised And The Disposition Thereof

See Petitioner's Petition For A Writ Of Certiorari, pp. 14-15. In addition the Petitioner fails to cite the fact that he petitioned the Supreme Court for the State of

Alabama for certiorari on the issue cited and the writ was denied.

C. Statement Of The Facts

On October 15, 1993, the Alabama Department of Environmental Management ("ADEM") terminated the employment of the Appellee, Robert Hagood. Mr. Hagood was informed orally and in writing that his termination was due to his failure to meet the performance standards of his position. (C. 93-94)

Dave Davis hired Mr. Hagood on March 23, 1991, as a Pollution Control Specialist working in the RCRA Compliance Branch of ADEM's Land Division. (C. 251). At the time that Mr. Hagood was interviewed for the position, Dave Davis had only recently been made a supervisor and Chief of the North Unit of the RCRA Compliance Branch. (C. 335). Mr. Hagood was the first employee Mr. Davis hired. (C. 335).

The RCRA Compliance Branch of ADEM's Land Division is charged with enforcing ADEM Hazardous Waste Regulations. Mr. Hagood's position was that of a hazardous waste inspector. As an inspector, Mr. Hagood was required to inspect regulated facilities on behalf of ADEM, identify and document violations of regulations, communicate the nature of those violations to the regulated community and his supervisors, and prepare appropriate enforcement actions. When inspecting a facility, it is the inspector's job to recognize possible points of hazardous waste generation, treatment, storage and disposal. Recognition of regulated units of hazardous waste requires discretion and professional judgment by inspectors while in the field. Although many substances are specifically listed

in the regulations as hazardous wastes ("listed wastes"), there are many regulated hazardous wastes which are not listed by name as hazardous wastes. Instead, there must be a determination made as to whether the waste exhibits a characteristic of hazardous waste such as toxicity, reactivity, ignitability or corrosivity (characteristic wastes). In many cases, a sample of the waste must be taken to determine if the waste exhibits any of the four characteristics mentioned above. Additionally, an inspector must be able to recognize signs of illegal disposal of hazardous wastes, such as distressed vegetation, suspicious stains, etc. (C. 252-256).

ADEM provides extensive training in inspection techniques, sampling protocol, and regulatory interpretation in order to provide its field inspectors with the skills and training necessary to perform their jobs. During his first three months on the job, Mr. Hagood was given extensive training to include the study of regulations, extensive field training, and the observance of senior inspectors in the field. (C. 261). In addition, during his six-month probationary period, Mr. Hagood was afforded extensive formal training, including an EPA three-day inspector course, 40 hours of safety training, sampling training, and 40 hours of hazardous waste training. (C. 261-268).

During his six-month probationary period, there were problems with Mr. Hagood's job performance. For example, Mr. Davis in his September 6, 1991 six-month employee pre-appraisal of Mr. Hagood's job performance found that Hagood, "should strive to further understand the practical application of the Rules and how they are promulgated from the [hazardous waste] Act. (C. 95-106). However, because Mr. Hagood was the first employee Dave Davis had hired and trained, Mr. Davis had no one

with which to compare Mr. Hagood's progress. (C. 335). Thus, despite his reservations, Mr. Davis decided that Mr. Hagood might be able to perform the job adequately with additional training. (R.99). Mr. Davis rated Mr. Hagood's probationary employment as acceptable and recommended that Mr. Hagood be given permanent merit system status. On September 23, 1991 Mr. Hagood became a permanent status employee of the Department. (C. 95-106).

After Mr. Hagood received permanent status, Mr. Davis began to doubt his decision to recommend that Mr. Hagood be given permanent status. (C. 336). Mr. Hagood frequently ignored and overlooked potential hazardous waste generation points. He failed to inspect paint spray guns at Spiral Industries (C. 272); he failed to inspect ancillary equipment at Reynolds Alloys. (C. 273). Following inspections in which the Plaintiff made errors, Mr. Davis would point out the errors to Mr. Hagood in an effort to help Mr. Hagood improve his inspection activities. The Plaintiff's errors were not always pointed out to him during the actual inspections because Mr. Davis did not want Mr. Hagood to be embarrassed in front of the facility representatives who accompanied them on inspections. Instead, Mr. Davis waited until he could speak to Mr. Hagood in private or in writing to provide guidance. In addition, pointing out Mr. Hagood's errors in front of facility representatives would have caused both Hagood and ADEM to lose credibility with the facility representative. Mr. Davis extensively conducted both verbal and written counseling with Mr. Hagood with regard to his poor job performance. (C. 271, 272-273, 281, 284, 292-293, 296-297, 298, 301, 302, 324, 326, and 356-357). (See Department's exhibits C. 95-106, 110-111, 112-117. 130-150, 152-159, 161-165, 176-179, and 166-170).

On or about May 22, 1992, Davis held a counseling session with the Plaintiff in order to address Mr. Hagood's substandard job performance. During this session, Davis gave Hagood a memo outlining the specific deficiencies in Mr. Hagood's performance. (C. 161-164). The memo noted the following deficiencies in Hagood's job performance: Hagood's failure to inspect and observe a baghouse at Stockham Valve despite its being a hazardous waste generation point (C. 269); his failure to recognize paint spray guns at Spiral Industries as a potential hazardous waste source (C. 272); and his failure to inspect underground storage tank leak alarms at Reynolds Alloys (C. 273). Davis also suggested several avenues for improvement by Mr. Hagood. (C. 161-164).

Nevertheless, Mr. Hagood's performance failed to improve. For example, Davis accompanied Mr. Hagood on an inspection trip in September, 1992 and noted numerous errors. (C. 279). These errors include an incident in which Hagood failed to observe two large and clearly improper gasoline disposal areas. Hagood walked out of one building at this site and failed to notice and inspect stressed and dead vegetation, as well as stained vegetated areas exposing gasoline laden ditches. (C. 282). After each inspection was concluded, Davis pointed out the errors Mr. Hagood made during the inspection. (C. 282-286). When the two returned to the office, Davis met with Hagood and again counseled him about his poor performance. (C. 280).

Approximately ten months after the September 1992 inspection trip, during which time the Hagood's job performance failed to improve, Davis sent a memorandum to Hagood providing that Hagood would undergo a 45-day review period. (C. 286). This memo was dated July 28, 1993. (C. 286). The memo provided that Hagood was to

receive "additional on-the-job training and also another opportunity to demonstrate [his] ability to perform both field and office tasks relative to the performance standards established for [his] position. (C. 176-177). The memo further provided that at the conclusion of the review period, Hagood would be required to perform inspections and to undergo a performance evaluation by his supervisor. (C. 287). Moreover, the memo further provided that the specific areas in which he would be evaluated were his ability to identify and observe major hazardous waste generation points, and his ability to observe and identify violations of Department regulations at regulated facilities. (C. 287-288; C. 176-77). Davis informed the Plaintiff that if he accompanied Hagood on any inspections during the review period, he would do so only as an evaluator. (R. 58). In other words, Hagood was to act as the sole inspector or "lead man" during any inspections performed during the review period. (C. 289).[2]

Davis accompanied Hagood on a number of inspections pursuant to the July 28, 1993 memorandum. (C. 176-177). During these inspections, Davis once again observed serious deficiencies in the Plaintiff's inspection activities. (C. 289). For example, Hagood discovered an open container of solvent at a regulated facility during the September, 1993 inspections; however, he failed to deduce that if the facility had a hazardous waste stored on its premises, it also had a generation point for that hazardous waste on-site as well. (C. 411; 415-418). As a result,

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[2] Designation as the lead on an inspection means the inspector is to conduct the inspection as if he were at a facility on a solo inspection. Other ADEM personnel are usually only present to evaluate an inspector's performance. This type of inspection provides the supervisor with an opportunity to evaluate the inspector's performance in the field.

Hagood failed to discover and inspect how and where the hazardous waste was generated at that site. (C. 411; 415-418).

Hagood made similar mistakes during other September 1993 inspections. Mr. Hagood failed to inspect and then inquire about paint filters in a paint booth. He also failed to investigate the identity of a material staining an extensive area of soil. (C. 290-298).

The Plaintiff's problems were not limited to just his failure to properly inspect regulated facilities (C. 161-164; 176-177; 171-175). Hagood also consistently failed to be able to apply agency regulations to real life situations in the field. During a March, 1992 inspection of a facility in which Davis accompanied the Plaintiff, Hagood failed to require the facility owners to make a waste determination even though several drums of material were poured on the ground. (C. 301). Under Department regulations, a regulated facility must make a waste determination before disposing materials in this fashion; nevertheless, Hagood failed to recognize this obvious deviation from Department regulations. (C. 301). On another occasion, Hagood failed to verbally inform a facility of how to properly achieve a tank closure. (C. 302; C. 161-64). Davis pointed out this failure to Hagood in the May 22, 1992 memo. (C. 302-303; C. 161-64). Both Davis and the senior hazardous waste inspector witnessed an incident where Hagood noted that the facility had stored some of its products in a hazardous waste storage area and then proceeded to tell the facility owner that it would have to construct a separate storage facility under Department regulations. (C. 303; 421). This was in error; under Department regulations, a facility can remain in compliance with Department regulations and still store its products in a hazardous waste disposal area. (C.

303; 421). Mr. Hagood also failed to communicate basic regulation requirements to a facility after its operators had asked him fundamental compliance questions. (C. 306). On another occasion, Hagood failed to inform a facility that it could eliminate a storage area, thereby saving the facility inspection time and money. (C. 305-306).

The final performance evaluation for Hagood chronicles continued failures by Mr. Hagood to apply the regulations to field situations. (C. 152-159). For example, Mr. Hagood failed to evaluate whether a facility had hazardous waste on-site due to a failure to properly apply Department regulations. (C. 309-310). Prior to termination, Mr. Hagood was counseled in writing, and was "down graded" on his evaluation. (C. 310-311; C. 118-122; 152-59).

Hagood also had serious problems with his ability to conduct proper on-site sampling. (C. 311). These problems were first formally addressed in the Plaintiff's first annual performance appraisal. (C. 118-22). These problems include a failure to sample obvious material on the ground (C. 312)[3]; failure to maintain chain of custody of samples by not keeping possession of the ice chest in which they were stored (C. 316-317); and a lack of knowledge of a basic sample receipt form (C. 318).

In September, 1992, Davis accompanied Hagood on an inspection during which Hagood used a dirty Gatorade™ bottle collected from a trash can to scoop up a sample of material (C. 313-316). Hagood did this because he had failed to bring a sufficient number of sampling

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[3] This is also an example of Hagood's failure to properly apply regulations while in the field.

scoops (C. 313-316). Hagood committed this obvious violation of Department sampling procedures in the presence of the facility's contact person. (C. 313-316). This occurred despite the fact that Hagood had received 16 hours of formal training in how to conduct on-site sampling, and had made numerous trips to the field to view proper sampling procedures. (C. 313). The September 1993 memo established that Hagood failed to inspect and sample the ground at a facility where it was called for by departmental procedures (C. 319).

In addition to these performance problems, Hagood also exhibited poor professionalism and demeanor while dealing with employees of regulated facilities. (C. 320-327). Hagood's demeanor included inappropriate laughter and comments to facilities' employees. (C. 320-327). He was counseled verbally and in writing regarding these problems. (C. 320, 324, 326, 328-329). Hagood was also deficient in his written work and correspondence for the Department. (C. 338-329).

Finally, Mr. Hagood poorly performed the office and record keeping tasks assigned to his job position. Mr. Hagood often would fall so far behind on his office tasks, i.e. trip memos, written correspondence, etc., that his supervisor had to keep him from returning to field assignments so that he could complete this work before generating new work. (C. 361). Davis had to have another inspector who had accompanied Mr. Hagood on an inspection trip re-draft a trip memo (written documentation of the inspector's trip to a facility, and the violations that were observed) written by Hagood because it was deficient and poorly written. (C. 371). Due to Hagood's failure to adequately process his workload in a timely manner, important correspondence with regulated facilities failed to

be sent out on time. (C. 374). In addition, Hagood's supervisor found Mr. Hagood's writing ability to be poor, and below that which was necessary to complete the record keeping demands of his job. (C. 337). On one occasion, Hagood sent a letter to a regulated facility which provided the facility with an erroneous EPA identification number. (C. 384).

On another occasion, Hagood failed to obtain an emergency EPA identification number, as previously instructed, for a regulated facility prior to leaving the office for field work, which resulted in his supervisor having to perform the task. (C. 458-459).

Hagood even traveled to Mobile (a trip that takes three hours travel one-way) for a professional seminar on the wrong day, even though the seminar date and time were provided to him well in advance of the class. (C. 449). After the termination of Hagood, his supervisor had to completely re-write one of his assignments, a project which lasted nearly four months. (C. 470-471).

During the 45-day additional performance review period provided to Hagood, he displayed a continued inability to perform the duties of his job, in particular, his inspection duties. For example Mr. Hagood again failed to inspect paint filters as a potential source of hazardous waste during this inspection period; he also failed to exhibit deductive reasoning in determining if he made a thorough inspection at Dow United; Mr. Hagood could not demonstrate that he could complete a proper file review prior to going into the field; and he failed to require a facility to make a waste determination on a large stained area. (C. 171-175).

Mr. Hagood's other deficiencies also continued during the additional performance review period of July-September, 1993. Mr. Hagood continued to exhibit an inability to apply Department regulations in real-life situations encountered while in the field. (C. 166-170). Mr. Hagood's office work continued to be sub-par and deficient (C. 166-170). He continued to display inappropriate demeanor and behavior in the presence of employees of regulated facilities. (C. 166-170).

It was only after reviewing all of these problems, and each of the incidents described herein that Davis, Hagood's supervisor, decided that it was necessary to recommend the termination of Hagood's employment. (C. 171-175). There was no conspiracy to fire Hagood (C. 463). The Department terminated Mr. Hagood's employment only after the Department exercised a full range of progressive discipline. (C. 465). The Department used verbal counseling, additional on-the-job training, extensive additional professional training, written counseling and constructive criticism, and finally an additional performance review period, all prior to the Plaintiff's termination, in its efforts to raise his job performance to a level which met standards (C. 176-179) (C. 271, 272-273, 281, 284, 292-293, 296-297, 298, 301, 302, 324, 326, and 355-356). (See Department's exhibits C. 95-106, 110-111, 112-117. 130-150, 152-159, 161-165, and 166-170).

Indeed, Hagood received more on-site and professional training than any other person holding a comparable position in the RCRA Compliance Branch of ADEM's Land Division. (C. 333-340). As a result of Mr. Hagood's failure to perform his job to standards, and only after repeated attempts were made to address the problem,

short of termination, Mr. Davis recommended that Hagood be terminated on September 27, 1993. Mr. Davis' supervisors at ADEM reviewed the facts and concurred with Mr. Davis; Mr. Hagood was formally terminated on October 15, 1993.

REASONS FOR DENYING THE PETITION

The Petitioner's stated "raison d'être" for seeking certiorari from this Court is the fact he feels he was not given due process. After a review of the record and procedural history in this case, it is evident that the Petitioner has failed by wrapping himself a little too tightly around the 14th Amendment. The fundamental purpose of the due process clause is to allow an aggrieved party the opportunity to present his case and to have its merits fairly judged. U.S.C.A. Const. Amends. 5, 14; *Okeson v. Tolley School Dist. No. 25 Renville County, State of N. D.*, 760 F.2d 864 (8th Cir. 1985), reversed 766 F.2d 378. Procedural due process requires only an opportunity to be heard at a meaningful time in a meaningful manner. U.S.C.A. Const. Amend. 5, 14; *Cherry v. Heckler*, 760 F.2d 1186 (11th Cir. 1985). The essence of due process is notice and opportunity to be heard. U.S.C.A. Const. Amend. 14, *Davis v. Lane*, 814 F.2d 397 (7th Cir. 1987).

What the 14th Amendment and due process clause do not guarantee you is that if you have your notice and meaningful opportunity to be heard, that any recommendation by the hearing officer will not be modified or altered by the State Personnel Board. The Respondents, in responding to the Petitioner's Petition For A Writ Of Certiorari to the Alabama Supreme Court divided said response into three sections. The first section dealt with why the Petitioner was not denied due process of law under

the 14th Amendment to the United States Constitution. The second section established that the cases relied on by the Petitioner in his petition are distinguishable or unpersuasive. The final section responded to the Petitioner's argument that the Personnel Board's decision affirming petitioner's termination from ADEM is the "emasculating of a terminated merit system employee's fundamental avenue of relief."

A. The Petitioner Was Not Denied Due Process Under The 14th Amendment To The Constitution.

In the instant case the Petitioner has cloaked his stated issue for certiorari in terms of his being denied due process by the State Personnel Board. However, a closer review of the argument reveals his issue remains, as it did below, one of whether there was evidence to support the Board's decision to uphold the dismissal of Hagood, in light of the Hearing Officer's recommendation. The Court of Civil Appeals of Alabama and the Supreme Court of Alabama appropriately reviewed this issue and upheld the Personnel Board's order. This issue is not available for review by this Court[4].

In support of this contention the Respondents would direct the Court to the Petitioner's summarization of his argument on page 23 of his Petition, "*(f)ollowing the hearing, the Hearing Officer entered a lengthy proposed order in which he assesses the credibility, demeanor, and veracity of the evidence. On the heals (sic) of this*

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[4] The Petitioner also agrees that this Court cannot review this issue in footnote 3 of the Petitioner's Petition For A Writ Of Certiorari, p. 15.

exhaustive proposed order, the Board, without hearing any evidence, rejected the findings and conclusions of the Hearing Officer". (Petitioner's Petition For A Writ Of Certiorari, p. 23). Also, according to Petitioner in his Statement of the Case, on March 18, 1994 the Hearing Officer, *"conducted an extensive hearing at which all affected parties were given a full and fair opportunity to present demonstrative evidence, verbal testimony and oral argument."* (Petitioner's Petition For A Writ Of Certiorari, p. 12).

The above-cited admissions by the Petitioner clearly reflect that he was afforded due process, and that his true objection is with the outcome of that due process. The heart of the Petitioner's argument is that the State Personnel Board should not have reversed the Hearing Officer, because the Hearing Officer heard the evidence ore tenus, and in his opinion *"the Board, without hearing any evidence, rejected the findings and conclusions of the Hearing Officer."* (Petitioner's Petition For A Writ Of Certiorari, p. 23). Petitioner is correct that the Board heard oral arguments, but Petitioner misleads this Court when he states "no evidence was presented." The State Personnel Board made its decision after having the benefit of reading the transcript[5], reviewing all the massive documentary presented at the hearing (C. 92-250), and hearing oral argument of counsels. Furthermore, ADEM's written exceptions to the State Personnel Board made specific references to unrefuted evidence presented in its documentary evidence at the hearing. The State Personnel Board made reference to both the documentary evidence

[5] Transcripts are not made available to hearing officers for use in making their recommendations. Respondent ADEM purchased and provided the Board with copies of the entire transcript in this case, prior to the Board issuing its final order in the case.

and ADEM's written exceptions to that documentary evidence, during the oral argument before the Board:

> **HARRELL** (Board Member): Hold on, let me get back to the hearing officer's report. In the hearing officer's report on the first page--he makes a statement, and I'm quoting, "Nothing in this hearing indicates to this hearing officer that at any time during Hagood's employment at ADEM his standard of conduct failed to be satisfactory." Yet, in the Department's rebuttal to the hearing officer's Report, there is clear documentation, that I am certain was presented at the hearing, of the performance appraisal where this employee did not meet standards. And, he was down graded on specific task statements as to why this performance appraisal did not meet standards.
>
> Now I'm confused on how the hearing officer could have access to this information and make such a statement in the hearing officer's report. Because the facts are there and if this was introduced as evidence as an exhibit at the hearing then I would have to take issue with the hearing officer's report and that statement made there. Cause it's just not true. (Emphasis added.) (See Motion to Supplement Record, C. 680).

State Personnel Board Member Harrell made clear and specific reference to the Department's documentary

evidence and the Department's written exceptions, and from her commentary, it is clear she had reviewed the documentary evidence. It simply cannot be said that Mr. Hagood was not afforded due process simply because the State Personnel Board appropriately reversed a hearing officer where there existed substantial evidence to sustain his termination.

When minimal due process requirements are met, a claim that an agency's policies or regulations have not been adhered to does not sustain an action for redress of procedural due process. U.S.C.A. Const. Amends. 5, 14; 42 U.S.C.A §§ 1981, 1983; *Goodrich v. Newport News School Bd.*, 743 F. 2d 225 (4th Cir. 1984); *Atencio v. Board of Education of Penasco Independent School District*, 658 F.2d 774 (10th Cir. 1976); *Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976).

Undeniably, in the case at bar, Mr. Hagood's minimal due process requirements were met. Mr. Hagood even admits in his brief that the Hearing Officer *"conducted an extensive hearing at which all affected parties were given a full and fair opportunity to present demonstrative evidence, verbal testimony and oral argument."* (Petitioner's Petition For A Writ Of Certiorari, p. 12.) The Petitioner is really arguing that the State Personnel Board erroneously rejected the Hearing Officer, therefore violating either State Personnel Board Rule 670-X-5-.07(3), or *Ala. Code* § 36-26-27, (1975). The Respondents disagree with this assertion, yet even if the State Personnel Board violated the aforementioned regulation or statutory provision, it would not sustain an action for redress of procedural due process. Furthermore, the Board's order and the evidence supporting it were carefully reviewed and weighed by the Court of Civil

Appeals and the Supreme Court of Alabama, and the Board's determination was upheld.

This Honorable Court has said, "(i)t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed 2d 67 (1984). Rule 10 of the Rules of the Supreme Court of the United States states that, "*[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari will be granted only for compelling reasons.*" The substantial evidence found by the Board in support of the termination has been given exhaustive review before Alabama's Appellate Courts and has been upheld. The Petitioner has stated no compelling reason in support of his petition for certiorari. This issue is not properly before the United States Supreme Court and the petitioned for writ of certiorari should not lie.

B. Cases Relied On By The Petitioner Are Distinguishable Or Unpersuasive.

The Petitioner, in his brief, relies very heavily on the legal tenet of "the one who decides must hear" and a case quoting that tenet (*Morgan v. U.S.*, 298 U.S. 468, 80 L.Ed. 1288, 56 S.Ct. 906 (1931)), as persuasive authority for granting the petition for certiorari. Of course the Petitioner seeks to view that tenet in a legal vacuum, without consideration to the above-cited well established legal principles relied on by the Court of Civil Appeals in deciding this case. (See items 1-5, on pp. 28-29 of this Brief). Furthermore, a close review of the *Morgan* case reveals why the Petitioner cites only a few words from the

opinion and hails it almost as automatic authority for granting a writ of certiorari. A closer review of the *Morgan* case, *Id.*, establishes that the opinion is not dispositive of the case at bar.

The facts of the *Morgan, Id.*, case are as follows: The proceeding was instituted by an order of the Secretary of Agriculture directing an inquiry into existing rates. The Plaintiffs brought the suit attacking the Secretary's Order, in part because the hearing process had denied their due process. During the hearing before the rate examiner the court found the following occurred:

> That, at the conclusion of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied, and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to Acting Secretaries the determination of issues with respect to the reasonableness of the rates involved. That, when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither [sic], absent nor otherwise disabled, but was at his office in the Department of Agriculture, and the appointment of any other person as Acting

> Secretary was illegal. That Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding, and had not heard or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives. (Emphasis added.)

The Court further found as follows:

> While the Assistant Secretary heard argument, he did not make the decision. The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume the responsibility. (Emphasis added.)

Based on those facts the United States Supreme Court found no authority for the Department of Agriculture's contention that, "one official may examine evidence, and another official who has not considered the evidence may make findings and order." The Court further reasoned, "In such a view, it would be possible ... for one official to hear the evidence and argument and arrive at certain conclusions

of fact and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. (*Id*, at 911-912).

The *Morgan* case is completely distinguishable from the present case. In this case Mr. Hagood was dismissed by ADEM, he appealed to the State Personnel Board, who in turn appointed a hearing officer.

The State Personnel Board, in this case, had before it copies of all the documentary evidence that the Respondent ADEM had presented at the hearing. Furthermore, ADEM's written exceptions made specific references to unrefuted evidence presented in its documentary evidence at the hearing and a copy of the transcript. The Board made reference to both the documentary evidence and ADEM's written exceptions that made reference to that documentary evidence, during the oral argument before the Board. (See p. 18 of this Brief).

State Personnel Board Member Harrell made a very clear and specific reference to the Department's documentary evidence and the Department's written exceptions, and from her commentary, it is clear she had reviewed the documentary evidence. Plainly the instant case is not in conflict with the *Morgan* case, and is quite distinguishable both factually and procedurally. In the instant case a hearing officer who heard the evidence made a recommendation to the Personnel Board.[6] The Personnel

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[6] This admission in Petitioner's Statement of the Case, contained in his Brief Of Appellee-Petitioner Hagood In Support of Petitioner [sic] For A Writ Of Certiorari, filed January 24, 1997, alone distinguishes the *Morgan* case from the case at bar.

Board, pursuant to State Personnel Board Rule 670-X-5-.07, reviewed the hearing officer's recommendation, the actual transcript of the hearing (which is important because the hearing officer did not have a copy of the transcript when he made his recommendation), the written exceptions of the Department, the oral arguments of the parties, and the written documentation (exhibits) presented at the hearing and decided to reject the hearing officer's recommendation, finding evidence to support the Department's decision to terminate. In the *Morgan* case, one hearing officer heard the evidence and another hearing officer made the recommendation without benefit of evidence or argument. The Hagood case in no way conflicts with the United States Supreme Court's decision in *Morgan,* and the decision should not serve as a basis for issuing a writ of certiorari.

Other circuits have agreed with this analysis. In *Bates v. Sponberg, supra,* the 6th Circuit Court of Appeals held that a tenured faculty member at a university was not denied his right to procedural due process on the asserted basis that the hearing on his dismissal was held before the faculty senate grievance committee but that the final judgment on his discharge was passed on by the board of regents which allegedly failed to review the record of the faculty members discharge hearing. Mr. Bates also relied very heavily on the *Morgan v. U.S., supra,* case, as noted by the court. However, the 6th circuit failed to be persuaded, holding instead:

> The primary defect which the Supreme Court found in the procedure followed by the Secretary of Agriculture in *Morgan* was his failure to consider the evidence which had been presented, though under a statutory

> duty to make that decision. The plaintiff claims that this decision, together with Justice Hughes' observation that "the one who decides must hear," indicates that the Board of Regents' conduct violated due process. We believe, however, that in its context, the statement relied upon as well as the overall nature of the decision fail to support Bates' claim. (at 331)

The Court further reasoned:

> We think the crux of the issue, in terms of due process under the Fourteenth Amendment, is not whether the due process hearing to which Professor Bates may have been entitled was held in the presence of the authority having final responsibility to determine his discharge, but instead whether the hearing accorded him was meaningful. We believe this question must be measured in terms of the issue to be decided, who is ultimately to decide it, and the manner by which the hearing is employed in the decisional process, in light of the realities of efficient administration in modern government. (at 332).

The Petitioner also cites the *Harbin* case, *infra*, as conflicting with the decision in this case. In *Harbin v. Ala. Public Service Com'n*, 474 So. 2d 63 (Ala. 1985), a freight line applied for authority to institute a new operation as a common carrier. An administrative law judge found there was insufficient evidence to demonstrate existing service was inadequate and recommended the application be

denied. The Public Service Commission ("PSC") granted the application. The existing freight lines appealed.

The PSC found that "the administrative law judge accurately summarized the evidence presented, but erred in his conclusions." (*Id.* at 64). The Circuit Court affirmed the PSC decision. The issue before the Supreme Court was whether the PSC erred in applying the law to the facts found or whether the order was based on findings of fact contrary to legal evidence of substantial weight. The Alabama Supreme Court held:

> utilizing the above statutory standard, and having carefully reviewed the record, we must conclude that the order of the APSC is supported by credible, competent, and substantial evidence. Thus we affirm the older of the circuit court which affirmed the order of the APSC. (*Id.* at 65)

Clearly the *Harbin* and this case are similar. Especially when you review the Court of Civil Appeals' Order in this case, which held that, "[a]fter reviewing the record, we conclude that Davis's evidence not only was relevant, but also sufficient to support the Board's determination. See *ADEM v. Hagood*, No. 2950408, slip op. at 5 (Ala. Civ. App. January 10, 1997). The *Harbin* case does not conflict with the decision in this case and accordingly should not serve as a basis for issuing a writ of certiorari. Actually, these two opinions are more in harmony than conflicting.

Petitioner Hagood also cites *Alabama Public Service Commission v. Perkins*, 275 Ala. 1, 151 So. 2d 627 (1962) as a case with which the opinion in *ADEM v. Hagood* conflicts. In *Perkins* a motor carrier application

was before the PSC. PSC granted the application and Perkins appealed. The circuit court reversed and the PSC appealed to the Supreme Court. The Court did find that:

> Since the attorney-examiner alone saw and heard the witnesses and observed their demeanor on the stand, it would be illogical and unwarranted on the part of both the Circuit Court not to indulge some favorable presumption in considering the attorney-examiner report as a part of the whole record. Especially this is true when the findings and conclusions find support in the evidence. (Emphasis added.) (*Id.* at 632).

The Hearing Officer's recommendation, in this case, was considered by the Board as part of the record as a whole. It simply failed to find support when measured against the voluminous documenting evidence, introduced by ADEM, and uncontested by Hagood at the hearing. Again the Court of Civil Appeals' opinion is not in conflict with the *Perkins* case, but merely in keeping with it.

None of the cases or arguments submitted by the Petitioner provide authority for this Court to grant the petition for certiorari.

C. Petitioner's Argument That The Court Of Appeals Decision Is The "Emasculating Of A Terminated Merit System Employee's Fundamental Avenue Of Relief" Is Baseless And Ill Conceived.

The Petitioner concludes his petition by decrying the Court of Appeals ruling, in this case, as the *"emasculating of a terminated merit system employee's*

fundamental avenue for relief—a hearing before a neutral adjudicator, at which time he or she has a meaningful opportunity to present evidence and refute the charges against them". These assertions by the Petitioner are ineffective and unpersuasive. The Petitioner's above characterization of the Court of Civil Appeals decision is misleading. The Court of Civil Appeals' well reasoned five page, single-spaced opinion was grounded in the following established principles of law:

1. A hearing officer is not a "co-equal statutory authority" with an agency Board. *Thompson v. Alabama Department of Mental Health*, 477 So. 2d 427 (Ala. Civ. App. 1985) (See *ADEM v. Hagood*, slip op. No. 2950408, (Ala. Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.);

2. The State Personnel Board has the authority to "modify, alter, set aside or affirm [a hearing officer's] report". Regulation 670-X-5-.07, Alabama State Personnel Department Administrative Code, (See *ADEM v. Hagood*, No. 2950408, (Ala. Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.);

3. If the State Personnel Board rejects an officer's findings, the Board's supporting evidence must be substantial when measured against the officer's findings as well as the contrary evidence; *Personnel Board v. King*, 456 So. 2d 80, 82 (Ala. Civ. App. 1984), (See *ADEM v. Hagood*, slip op. No. 2950408, (Ala.

Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.)

4. Substantial evidence is "relevant evidence that a reasonable mind would view as sufficient to support a determination". *Creagh v. City of Mobile Police Department*, 543 So. 2d 698, 699 (Ala. Civ. App. 1989) (citation omitted), (See *ADEM v. Hagood*, slip op. No. 2950408, (Ala. Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.); and finally

5. If the Alabama Court of Civil Appeals concludes that there was evidence to support an agency board's order, then it must affirm. *State Department of Corrections v. Cooke*, 530 So 2d 839 (Ala. Civ. App. 1988), (See *ADEM v. Hagood*, slip op. No. 2950408, (Ala. Civ. App. January 10, 1997), Petitioner's Petition For A Writ Of Certiorari, App. 4a.).

The Court of Civil Appeals searched the entire record in this case (including the written documentary evidence submitted by the Department at the hearing) and found evidence to support the State Personnel Board's order and accordingly and appropriately affirmed its order, by reversing the Circuit Court. The hearing officer does not have co-equal statutory authority with the State Personnel Board, and the Board may reject a hearing officer's findings even though not clearly erroneous, if the other evidence provides sufficient support for its decision. *State Department of Corrections v. Cooke*, 530 So.2d 839 (Ala. Civ. App. 1988). Clearly the opinion of the Court of Civil Appeals in this case is in keeping with the law of the State

of Alabama, and a petition for a writ of certiorari should not be granted.

CONCLUSION

WHEREFORE, it is respectfully requested, that for the reasons and arguments contained in this Brief In Opposition To Petition For Certiorari, that the Petition for Writ of Certiorari be denied.

Respectfully submitted this the 14th day of August 1997.

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